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No. 73-393

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

A. HENRY TAGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-8A) is reported at 479 F. 2d 120.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1A) was entered May 17, 1973, and a petition for rehearing was denied July 5, 1973 (Pet. App. 9A). Mr. Justice White extended petitioner's time for filing a petition for a writ of certiorari to September

3, 1973, and the petition was filed August 31, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict on the conspiracy count.

2. Whether prosecution of the conspiracy count was barred by the statute of limitations and whether the jury was properly instructed on that subject.

3. Whether the court below erred in applying the concurrent sentence doctrine so as to make unnecessary review of the conviction on the conspiracy count.

4. Whether the trial court erred in trying the substantive and conspiracy counts together.

5. Whether the trial court erred in admitting in evidence, on the substantive count, Government Exhibit 13-A, a cash disbursement journal.

6. Whether petitioner's conviction on the conspiracy count should be reversed on the theory that the trial court committed plain error in the admission of Government Exhibit 154, where the issue was never raised in the trial court and was raised in the court of appeals only after the petition for rehearing had been denied.

STATUTES INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency there-

of in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 7206(1) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(1), provides:

Any person who—

(1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * * shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of (1) filing a false income tax return for the calendar year 1964, in violation of 26 U.S.C. 7206(1); and (2) having unlawfully conspired to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of

the Internal Revenue Service in the ascertainment, computation, assessment and collection of income taxes, in violation of 18 U.S.C. 371. The court sentenced petitioner to concurrent 30-month prison sentences on each count and assessed costs against him in the amount of $3,546.49.

The court of appeals found the evidence sufficient on the substantive count and found petitioner's other contentions respecting that count to be without substance. It thereupon affirmed the judgment of conviction, finding it unnecessary to reach petitioner's contentions relating to the conspiracy count, since the sentences were concurrent (Pet. App. 8A).

Since petitioner does not now attack the sufficiency of the evidence on the substantive count, we shall discuss here only the evidence relating to the conspiracy count.

The conspiracy indictment alleged that petitioner and Jones, a co-conspirator but not a defendant, conspired to defraud the United States by impeding and obstructing the Internal Revenue Service in ascertaining and assessing income taxes. It was alleged to be part of the conspiracy that petitioner and Jones would and did prepare and file false 1962 United States income tax returns of Town Realty Corp. ("Town"), Salem Investment Co., Inc. ("Salem"), and the Jones and Tager law partnership. It was further alleged that the conspirators would and did fail to file tax returns for Town and Salem for 1963; and would and did fail to file the Jones, Tager, and McDaniel law partnership returns for the years 1963

and 1964. It was further alleged that petitioner would and did buy securities in his name and in the name of Town, Salem, or the Jones and Tager partnership and sell them in another of those names, with the purpose of making the transactions difficult to trace. It was also alleged that it was part of the conspiracy that the participants would not and did not make available adequate records to Internal Revenue Service agents who attempted to determine the correct income of the various individuals and entities named in the indictment.

The conspiracy count alleged ten overt acts, including the signing of certain tax returns by Jones and petitioner. The only two overt acts which came within the five-year statute of limitations [1] were the following:

> i. On or about the twenty-ninth day of November, 1966, at his office in the Rialto Building in Kansas City, Missouri, defendant A. Henry Tager had a conversation with Special Agent

[1] Since the case went to the jury on the theory that a five-year statute of limitations applied, we concede here, for purposes of the present case, that the statute applicable to this case provides for a five-year period (18 U.S.C. 3282). However, it should be noted that Section 6531 of the Internal Revenue Code of 1954 (26 U.S.C. 6531), providing for the prosecution of "the various offenses arising under the internal revenue laws," establishes a six-year period of limitations for "offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner." Thus, in a conspiracy in which the government preserved the argument that its case arose "under the internal revenue laws," it would appear that a six-year statute of limitations applies.

Martin J. Broderick and Revenue Agent Marvin Fiant.

j. On or about the twenty-ninth day of October, 1968, at the office of the Internal Revenue Service Intelligence Division in Kansas City, Missouri, defendant A. Henry Tager participated in a conference attended by [certain named individuals].[2]

The evidence to support the verdict on the conspiracy count may be summarized as follows:

Petitioner became a law partner of Robert Jones in 1957, and their partnership continued until 1963, when it became Jones, Tager and McDaniel (Tr. 424). In addition to the law partnership, petitioner and Jones formed and owned all the stock of Town and Salem (Tr. 310, 425, 426).

The Jones and Tager partnership return for 1962 (Govt. Ex. 11) reported a loss on the sale of securities in the amount of $449,432.15 (Tr. 281-282). The total sales of securities reported on this return were $3,596,303.29 (Tr. 282). While breakdown of this total is not shown on the return, Jones and Tager had sales of $1,171,456.18, Salem had sales of $1,982,607.06, and other entities had the balance (Tr. 283-285). The accounting firm which prepared the return made the assumption, probably on the basis

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[2] Petitioner errs in the statement (Pet. 6) that the last overt act ("j") alleged in the conspiracy count was abandoned during oral argument before the court of appeals. What government counsel said was that the government was relying mainly upon overt act "i" and *if* that was insufficient as a matter of law, then overt act "j" was also insufficient.

of discussions with petitioner, that Salem was only a "shell," whose securities transactions actually represented the dealings of Jones and Tager (Tr. 285-287). The partnership return was signed by Robert Jones (Tr. 429), although all of the securities transactions were initiated and completed by petitioner, sometimes in his own name, sometimes in the name of the partnership, sometimes in the name of Town or Salem (Tr. 433-434).

The 1962 partnership return of Jones and Tager showed income of some $112,000 from the practice of law, which was wiped out by the alleged $447,000 loss on the sale of securities, resulting in a net loss of some $335,000 (Tr. 431; Govt. Ex. 11). Jones reported half of the alleged loss from the partnership, or $167,966.95, on his 1962 individual income tax return (Tr. 432).[3] Petitioner reported the other half on his 1962 individual income tax return (Tr. 759).

Jones also signed the 1962 income tax returns of Town and Salem (Tr. 426, 427-428). The Town return reported a loss on the sale of securities of $5,645.70 (Tr. 427), and the Salem return reflected no trading in securities (Tr. 428), although there were numerous transactions in securities that year in the name of Salem (Tr. 430).

On January 1, 1963, the law partnership of Jones, Tager and McDaniel came into existence (Tr. 306-

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[3] Jones was of the opinion that the losses from the purchase and sale of securities in 1962 were overstated on the partnership return, and that the actual losses were less (Tr. 452.)

307). Although no 1963 partnership return for this firm was ever filed (Tr. 49-50), one was prepared by an accountant, Franke, from information received from petitioner and from the accounting firm that prepared the 1962 returns (Tr. 341, 348). In 1963, some of the securities transactions were in the name of Salem, some in the name of petitioner, and some in the name of Jones and Tager (Tr. 345-346, 436-437). The unfiled 1963 partnership return stated a loss on the sale of securities of about $41,000, which was reflected in the distributive share of partnership income reported by the partners on their individual income tax returns (Tr. 758). When he came to prepare the 1963 partnership return, Franke had information that sales of securities totalled $1,071,899.98 and that purchases totalled only $222,-135.12; he was told by petitioner that he had lost about $40,000 on the purchase and sale of securities that year, so Franke estimated purchase prices for many of the stocks, some of which were bought or sold in the name of Town and National Mutual Insurance Co. (Tr. 381-382).

Neither Town nor Salem filed an income tax return for the year 1963 (Tr. 50-51). Although a 1964 partnership return of Jones, Tager and McDaniel—which showed no sales of securities—was prepared, it was never filed (Tr. 50, 346).

Near the beginning of their investigation of the criminal case, Treasury agents interviewed petitioner on November 29, 1966 (overt act "i") (Tr. 706, 822). At that time, the revenue agents were hav-

ing great difficulty tracing petitioner's transactions in securities and asked him for the names of the stockbrokerage houses with which he had done business. Petitioner gave the names of only six and never gave the names of any others, although the agents asked for such information (Tr. 707-708, 823). Later investigation disclosed many other brokers with whom petitioner had done business (Tr. 823; Govt. Ex. 154). At no time did petitioner furnish the agents with any records of his accounts with any stockbroker (Tr. 826).

On October 29, 1968, the agents conducted another interview with petitioner (overt act "j"). They asked him why he had not reported his securities transactions on his 1963 and 1964 income tax returns, and he replied that he felt he had lost more than he had gained and therefore did not think it necessary to report these figures (Tr. 710, 827). He said nothing about the way he was purchasing or selling securities, nor did he indicate the returns on which the transactions actually had been reported (Tr. 710).

Government's Exhibit 154 (see Tr. 693-701) is a tabulation showing the petitioner's purchases and sales of securities in 1962 and 1963 through fourteen stockbrokers with whom he was known to have done business. Each figure is keyed to the number of the government's exhibit (stockbrokers' records) from which it came. A recapitulation on page 3 shows that the securities sold in 1962 through these fourteen stockbrokers exceeded the sales reported by

$72,044.25, and that the securities thus sold in 1963 exceed sales reported by $348,855.53. Government's Exhibit 156 is an analysis of some 33,955 shares of stock (and certain bonds) which were bought in one name and sold by petitioner in another name in 1962 or 1963. (See Tr. 771-776.)

The defense adduced no evidence.

ARGUMENT

1. Contrary to petitioner's contention (Pet. 42-45), the evidence was plainly sufficient to support the verdict on the conspiracy count. Petitioner's devices to deceive the tax authorities were a fraud within the meaning of 18 U.S.C. 371. See *United States* v. *Klein*, 247 F. 2d 908 (C.A. 2), certiorari denied, 355 U.S. 924; *Schino* v. *United States*, 209 F. 2d 67 (C.A. 9), certiorari denied, 347 U.S. 937; *Kobey* v. *United States*, 208 F. 2d 583 (C.A. 9); cf. *Glasser* v. *United States*, 315 U.S. 60, 64, 66. That statute is "broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government" (*Haas* v. *Henkel*, 216 U.S. 462, 479), which is to be accomplished "by deceit, craft or trickery, or at least by means that are dishonest" (*Hammerschmidt* v. *United States*, 265 U.S. 182, 188; *United States* v. *Klein*, *supra*, 247 F. 2d at 916). The government need not show an actual financial or property loss in order to make a case under this section. See *Haas* v. *Henkel*, *supra*, 216 U.S. at 479-

480 and cases there cited; *Hammerschmidt* v. *United States, supra,* 265 U.S. at 188.

Moreover, the conspiracy alleged in the case at bar plainly was a continuing one. See *United States* v. *Klein,* 247 F. 2d 908 (C.A. 2), certiorari denied, 355 U.S. 924; *Forman* v. *United States,* 361 U.S. 416, 423-424; *Hyde* v. *United States,* 225 U.S. 347, 367; *United States* v. *Kissel,* 218 U.S. 601.

The government still, in 1973, does not know the income tax liability of petitioner and Jones for the years 1962 and 1963. In order to compute their income, it would be necessary to have a complete listing of all capital gains and losses realized from the sale of securities, and it is impossible to prepare such a complete listing. Petitioner has never furnished the government with any of his stock brokerage accounts, nor do the Treasury agents know to this day just how many stock brokers he did business with. The 1962 partnership return gives no breakdown at all of the securities transactions, but simply shows total sales of $3,596,303.29 and purchases of $4,039,009.11 (Govt. Ex. 11, p. 4). The Internal Revenue Service has never been able to verify those figures, although it is known that there were at least $72,044.25 of sales unreported (Govt. Ex. 154, p. 3). As for 1963, the predicament of the Service is even worse. For in that year it is known that the sales reported on the partnership return were understated by at least $348,855.53 (Govt. Ex. 154, p. 3).

The practice of dealing with a large number of stock brokers, some of them still probably unknown to the government, and of buying securities in the name of one person, partnership or entity and selling them in the name of another has effectively frustrated the Internal Revenue Service in its efforts to reconstruct the income of petitioner and Jones (Govt. Ex. 156). This continuous course of conduct was not the result of inadvertence or misunderstanding, but rather the result of a deliberate plan, carried out primarily by petitioner but known to, and acquiesced and participated in, by Jones.[4]

We submit that the proof was plainly sufficient to support the verdict finding petitioner guilty on the conspiracy count.

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[4] Evidence of petitioner's guilty knowledge and intent is provided in the following testimony of McDaniel, petitioner's former law partner (Tr. 312):

> Q. * * * I understand you testified that you observed Mr. Tager signing checks.
>
> A. Yes, I've seen Mr. Tager sign many checks on many different corporations, on many different checkbooks, yes sir, I have.
>
> Q. Will you explain that more in detail?
>
> A. Sometimes he would have as many as twenty checkbooks. I have seen him write one check on one account payable to another account. A check on the other account payable to maybe two other accounts or three, or a check on three of them payable back to one, et cetera. I've seen a transaction where you make one payable to this one, another over here and another one back and to this one. I have inquired about why and what was going on. Some day there would be a time when the IRS would look this over, and he said, "I would like to see them follow that transaction."

2. There is no substance to the argument (Pet. 35-42) that prosecution of the conspiracy charge was barred by the statute of limitations and that the jury was improperly instructed on this subject. The government had to prove that there was an overt act committed within five years[5] of the date of the indictment, October 15, 1971, which act entailed more than a mere effort to cover up the fact that there had been a conspiracy, and which was designed to further the principal objective of the conspiracy. See *Grunewald* v. *United States*, 353 U.S. 391. There were two overt acts alleged within that five-year period (See, Statement, *supra*, pp. 5-6). Overt act "i", upon which we rely primarily, alleged that on or about November 29, 1966, at his office in Kansas City, Missouri, petitioner had a conversation with named Treasury agents. The proof showed that at this conference the revenue agents, having had great difficulty in tracing petitioner's transactions in securities, asked him for the names of the stockbrokerage houses with which he had done business. Petitioner gave the names of only six and did not indicate that there were any more, when there were in fact at least fourteen (Tr. 707-708, 823; Govt. Ex. 156.)

To constitute an overt act in furtherance of the conspiracy the jury had to find that petitioner's disclosure of only a few of his many stockbrokers was designed to accomplish the main objective of the

[5] See footnote 1, p. 5, *supra*.

conspiracy, *i.e.*, to impede and obstruct the Internal Revenue Service in its efforts to ascertain, assess and collect income taxes. *Grunewald* v. *United States*, *supra*. The jury was correctly instructed on this subject. Petitioner has set forth (Pet. 39-40) part of the court's instruction to the jury on this subject, but reference to the record (Supp. Tr. 273-274) discloses that more was said.[6] When the instruction is

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[6] Immediately following the part of the charge quoted by petitioner (Pet. 39-40), the court continued as follows (Supp. Tr. 273-274):

> You are instructed that a conspiracy, once formed, continues to exist until (1) it has accomplished its manifest purpose and objectives, or (2), it has ceased by the withdrawal of the members of the conspiracy evidenced by a clear showing of the conspirators to withdraw and no longer be a part of the conspiracy.
>
> In this case the indictment alleges that the conspiracy was made up of only two persons, the defendant and the named but unindicted co-conspirator, Robert C. Jones. If you find that there was a conspiracy as charged but that either of the conspirators clearly manifested his intention to withdraw from the conspiracy and did in fact withdraw therefrom prior to the commission of either of the last two alleged overt acts, that is, I or J that I have referred to, then the conspiracy ceased to exist as of that moment because a person cannot conspire with himself. In such case, prosecution of the defendant would be barred by the statute of limitations and he could not be convicted of the offense charged in Count 3.
>
> However, if the withdrawal from the conspiracy did not take place until after the commission of one of the last two alleged overt acts, I or J, and you found that all the essential elements of the offense had been proved—proven to your satisfaction beyond a reasonable doubt, then you should find the defendant guilty of the offense charged in Count 3.

read in its context, it is an entirely proper and complete charge (Supp. Tr. 272-274). The jury could not have found petitioner guilty under these instructions without first finding that his conversation with the Treasury agents (less than five years before the return of the indictment) was designed to accomplish the main objective of the conspiracy.

The evidence warranted the jury's findings that the overt acts proved were in furtherance of the conspiracy. This conspiracy did not attain its objective when the returns were filed. That was but the first step in the continuing conspiracy to impede the Internal Revenue Service in its efforts to ascertain and assess the correct income taxes of the conspirators. Cf. *Forman* v. *United States*, 361 U.S. 416, 423-424. Since even as to the year 1962 (the returns for which were not filed until January 1964) the period of tax assessment for civil purposes had not expired at the time of the November 1966 conference (see 26 U.S.C. 6501), the conspirators still had a vital stake in keeping the conspiracy alive, and it did not in fact come to an end until Jones began to cooperate with the government in June 1971.

3. There is no merit to the argument (Pet. 14-35) that the court below erred in invoking the concurrent sentence doctrine. This Court has recently reaffirmed in the context of a direct appeal its holding in *Benton* v. *Maryland*, 395 U.S. 784, that the concurrent sentence rule should be preserved as a matter of proper judicial administration. *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16. While some

circuits, as petitioner points out, appear to be more likely than others to apply the concurrent sentence rule as a matter of discretion, we see no conflict which would warrant the granting of a writ of certiorari. All the circuits recognize that while a court may in its discretion ignore the concurrent sentence rule when it chooses to do so, it is not required to review each count of a multi-count conviction on which concurrent sentences are imposed, unless substantial collateral legal consequences result from the multiple convictions. Recognizing this principle, petitioner makes three arguments: (a) That under *Sibron* v. *New York*, 392 U.S. 40, serious collateral consequences are *always* present (Pet. 33); (b) that these consequences relate to state habitual criminal statutes, possibilities of probation or parole, the question of impeachment in future court proceedings, and the stigma of being convicted of two offenses rather than one (Pet. 34); and (c) that in this case petitioner, being an attorney, suffers the serious collateral consequence that after his expected disbarment from the practice of law he will find it more difficult to gain reinstatement to the bar with the unreviewed conspiracy conviction hanging over his head (Pet. 34-35). None of these arguments has merit.

(a) *Sibron* v. *New York*, *supra*, did not involve the concurrent sentence doctrine. In that case Sibron was sentenced to six months in prison for possession of heroin. He had served his sentence before the appeal reached this Court. Noting that Sibron "could not have brought his case to this Court for review

before the expiration of his sentence" (392 U.S. at 51-52), this Court held that the case was not moot. The situation in *Sibron* bears no resemblance to this case. No claim is made that petitioner's appeal was moot.

(b) It is obvious that such routine and universal collateral consequences as those relating to state habitual criminal statutes, possibilities of probation or parole, and the question of impeachment in future court proceedings are not sufficient to require courts to ignore the concurrent sentence rule. If it were otherwise, there could be no concurrent sentence rule.

(c) Petitioner's claim that he will someday be reinstated to the practice of law if he is guilty of only one felony rather than two (Pet. 34-35) is without substance. The fact is that petitioner has been found guilty of *five* felonies, not two. In another case, petitioner was found guilty of three felonies in the United States District Court for the District of Kansas: (1) conspiring to transport in interstate commerce a United States treasury bill with a face amount of $100,000, knowing it to be stolen, in violation of 18 U.S.C. 371; (2) receiving the same treasury bill, in violation of 18 U.S.C. 2315; and (3) transporting the same treasury bill, in violation of 18 U.S.C. 2314. The Tenth Circuit reviewed all three convictions, affirmed all three on May 14, 1973 (*United States* v. *Tager*, 481 F. 2d 97), and denied a petition for rehearing on August 28, 1973.[7] In these circumstances, the possibility that a reversal

[7] Petitioner filed a petition for a writ of certiorari in that case on October 26, 1973, No. 73-694.

of one of the five felony convictions would have a substantial effect on petitioner's chances of being readmitted to the practice of law is too remote to be worthy of consideration.

4. There is no substance to the argument (Pet. 45-49) that the trial court erred in trying the substantive and conspiracy counts together. The court acted well within its discretion in ordering these two indictments, which related to petitioner's income tax matters for the years 1962 through 1964, tried together. The pre-trial order spelled out the reasons as follows:

> *Baker* v. *United States*, 401 F. 2d 958 (C.A. D.C., 1968) presents an analogous factual situation. In *Baker*, the defendant was charged in nine counts, including willful evasion of income taxes (Counts 1 and 2); and conspiracy to defraud the Government and defeat collection of taxes (Count 9). The Court experienced little difficulty in sustaining the joinder of Counts 1 and 2 with Count 9, even though the Government chose to proceed on a specific item theory in proving the evasion counts. The Court stated:
>
> > 'The predominant consideration is whether joinder would serve the goals of trial economy and convenience; the primary purpose of this kind of joinder is to insure that a given transaction need only be proven once.' *Baker* v. *United States*, *supra*, at 971; see *James* v. *United States*, 416 F. 2d 467 (5th Cir. 1969).
>
> These goals of trial economy and convenience are persuasive here, since the Court is otherwise

> satisfied that the tests of Federal Rules of Criminal Procedure 8(a) have been met.
>
> From an examination of the contents of the two indictments, it is obvious that the transactions overlap and, as the Government has stated, the same witnesses will be called to give evidence in each case. Therefore, the Court will permit joinder of the indictments for trial. Of course, the defendant is free to renew his request for Rule 14 relief at some later time, should it appear he is prejudiced; however, at this time, no evidence of prejudice is discernible.

At no time did petitioner renew his request for relief under Rule 14, Fed. R. Crim. P.

5. Petitioner claims (Pet. 48-49) that the court below erred in holding that Government Exhibit 13-A, the cash disbursement journal of Policy Budget Plan, Inc., was properly admitted in evidence. The argument is without merit. It is true that, beginning sometime in March 1964, the book was not kept up to date in the usual course of business (Tr. 180-181), but the last entries in the book relied upon by the government were dated March 2, 1964 (see two checks bearing that date—Govt. Exs. 15 and 16). Up until that time the book had been kept in the usual course of business (Tr. 131). The book was therefore properly admitted under the "shop-book" statute, 28 U.S.C. 1732. The exhibit was much more than only "one-half of the bookkeeping system" (Pet. 48); it was the book of original entry. Each entry represented a credit to the cash account and an offsetting debit. Moreover, for the month of January 1964 the book shows a complete recapitulation of

checks drawn. Those drawn in favor of petitioner that month ($22,515.75), plus the check for petitioner's personal car ($4,550.00), total $27,065.75, and that is the amount shown on the recapitulation to be charged to *petitioner's account* and not to any "Loans Receivable" or other account (Tr. 147-149, 200-201). There is no reason to believe that checks drawn to petitioner in February 1964 or on March 2, 1964, would have been treated any differently from those drawn to him in January 1964.

6. Petitioner contends, finally (Pet. 53 and Supplemental Brief, *passim*) that "[i]nflammatory and prejudicial evidence not of record was made available to the jury during its deliberations." This contention is also without merit. Petitioner's complaint —made for the first time after the petition for rehearing was denied—refers to Govt. Ex. 154, which we have described *supra*, at pp. 9-10. It is a tabulation showing petitioner's purchases and sales of securities in 1962 and 1963; the recapitulation (Govt. Ex. 154, p. 3) shows that the securities sold exceeded sales reported by $72,044.25 in 1962, and by $348,855.53 in 1963. Petitioner claims that the original exhibit contained certain additional figures which were supposedly erased, but which were still visible on the original upon close examination, and that the jury may therefore have gotten the impression that there were substantial unreported sales of securities in addition to those claimed by the government. However, these erased figures do not appear on the xerox copies of Govt. Ex. 154 which went to the jury after the

original was turned over to counsel for petitioner at the trial (Tr. 687-690, 697, 698, 712-713). Although counsel made many objections to the exhibit (Tr. 687-690) and cross-examined at length the government witness who prepared it (Tr. 749-756), no objection was made on the ground now urged.

Petitioner's contention is in the nature of a motion for new trial on the ground of newly discovered evidence, and it must fail because (1) counsel could have discovered it at the trial,[8] and (2) it is not of such a nature as probably to result in an acquittal at a retrial. *United States* v. *Craft*, 421 F. 2d 693, 695 (C.A. 9); *United States* v. *Spencer*, 415 F. 2d 1301, 1304 (C.A. 7); *United States* v. *Gleeson*, 411 F. 2d 1091, 1094 (C.A. 10); *Lindsey* v. *United States*, 368 F. 2d 633, 634 (C.A. 9), certiorari denied, 386 U.S. 1025. Moreover, there is every reason to believe that none of the jurors ever saw the original of the exhibit. When they retired to deliberate, each juror had a xerox copy (Tr. 746; Supp. Tr. 288)—on which the erased figures did not show up—and there would have been no occasion for any of them to examine the original exhibit.

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[8] It is clear that the *original* was turned over to defense counsel for examination at the trial, because the xerox copies were not in existence at that time. See Tr. 687-690, 697, 698, 712-713.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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